

BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:

[REDACTED],

Petitioner,

vs.

No. 01-61

KNOX COUNTY SCHOOLS,

Respondent.

FINAL ORDER

Administrative Law Judge:

William Jay Reynolds
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[**NOTE**- To protect the confidentiality of the minor student, [REDACTED]
will be referred to hereafter as "W"]

FINAL ORDER
CASE NO.: 01-61

I. Procedural Background

The Petitioner filed request for due process hearing on or about October 14, 2001 alleging, inter alia, certification, the right to an independent educational evaluation at public expense, the need for interim homebound services and denial of a Free Appropriate Public Education (FAPE). This case was initially assigned to Administrative Law Judge Kevin S. Key on October 24, 2001 and upon his recusal assigned to the undersigned on 13 February 2002. A Hearing was conducted at Knoxville Tennessee on September 9th, 2002. After reaching a tentative agreement on September 10th, 2002 the matter was continued until May 3rd, 2003. By agreement of the parties, and approval of the Administrative Law Judge, the matter reconvened on January 7th through 10th, 2003. At all hearings the petitioner had opportunity to appear and/or testify. On behalf of the Petitioner the record remained open to admit testimony by deposition of Dr. Gordon Greeson. It was completed on February 21, 2003. The 45-Day Rule was extended by agreement of the parties. Ms. Johanna McGlothlin; and Mr. William Allen, Attorneys at Law, represents the petitioner. Ms. Susan E. Crabtree, Attorney at Law, represents the Local Education Agency.

II. Statement of Facts

W is a 15-year-old young woman assigned to the 8th grade at the Karns Alternative Annex Program (KAAP) in the Knox County School System. W. is assigned to an all girl, ten student classroom with two teachers. This class is a part of the regular education program with individualized learning in reading and mathematics within Knox County Schools. Following an extensive evaluation by the school district and an Independent Educational Evaluation (IEE) by Corrine Bell, on December 6, 2001 and January 24, 2002, an IEP meeting was held to consider eligibility for W. (Ex. A. p. 580-588, 562-569). Both meetings were long, and reports and evaluations of W were reviewed. W, her mother, parent advocate, psychologist and attorneys from Knoxville Legal Aid attended and participated in the January meeting. W's mother, Dr Bell and parent's attorneys participated and attended the December meeting. The District determined that the student did not qualify and could not be certified for special education under the disability categories of Emotional Disturbance or Specific Learning Disability. The parent disagreed with this determination and requested a Due Process Hearing.

The mother, age 40, has a 12th grade education and, at the time of the due process hearing, worked at McDonald's restaurant. She worked the night shift in order to be home in the mornings to take W to school and to be home in the afternoons when W gets home from school. The mother takes medication prescribed for anxiety and depression and has also been in therapy. (T. pp. 243, 24, 273, 276) W has not seen her father for about 4 years. The father provides no financial support and has never visited with W on a regular basis. W's uncle and brother also live in the family home. (T. pp. 313-14).

W has had Bell's Palsy, Since September 2002, which paralyzed the right side of her face. She could not close her right eye and she drooled. The condition cleared up after treatment, but W still cannot blink her eye and her mouth is still lopsided. She has also had ear infection and sinus problems. (T. pp. 162, 250-251)

The educational history of this student is vital to understanding the conclusions of law and determination of this case. W. began school in the Knox County School System in August, 1993 as a Kindergartner; she was transferred to Ball Camp Primary School and was enrolled there January 3, 1994 (Ex. A, p. 3) While in Kindergarten W was absent 47 days, 19 days of which for head lice. Ms. Jill Carroll, Principal of Ball Camp Primary School, remembered W and described her as dark haired, a little chubby and missed a lot of school. Mrs. Carroll remembered she missed a lot of school because of head lice. (T, p. 619) In the second semester of Kindergarten, W had 25 absences and 5 tardies. (T., p. 622; Ex. A, p. 354) Ms. Carroll does not remember W as having anxiety problems or throwing up at school. (T., p 625) In fact, Mrs. Carroll had special ways of helping children who had anxiety problems or separation issues when they were in Kindergarten. As she never knew of W having an anxiety problems Ms. Carroll never used any such techniques to assist W. Mrs. Carroll was very involved with all the children that had any type of problem. (T. p. 625-6)

In First Grade, W missed 55 days of school. (Ex. A, p. 3) Because of the considerable absences in First Grade, the school social worker, Judy Wallace became involved. Ms. Wallace began contact with the family on September 23, 1994 (T., p. 627; Ex. A, pp 330-32) Head lice still seemed to be a problem, and Mrs. Wallace and the health nurse went by the home to deliver shampoo to the whole family. (T. pp 627; Ex. A., p. 632) From the sign-out logs for the First Grade, W was signed out on numerous occasions, but the only referenced reasons leaving indicate one time sick and one time for an eye doctor appointment. (T., pp. 629-32; Ex. A. pp. 337-54)

While in First Grade, W was certified as a student with learning disabilities and was certified for Special Education services under IDEA. The Integrated Assessment Report by the school district indicated that there were educationally relevant medical findings of "head lice has been a problem and contributed to absenteeism" and environmental problems "are a factor, however, they may not be the primary cause of the disability." (Ex. A. p. 809). W's cognitive measure of 83 and a test of early grading ability on which she scored an extremely low score established that she was learning disabled. The reading ability measure was significantly lower than would be expected based on her intellectual ability (T. p. 35-36). The Social and Emotional Assessment of W in First Grade indicated significant anxiety and depression and somatization in the home setting. (Ex. A., p. 532) Referral to the school guidance counselor was recommended. (Ex. A., p. 528) Also, W was given a speech/language assessment, but she did not certify for speech/language services. (Ex. A, p. 557)

The student attended school in Georgia for Second and Third Grades. While she missed 64 days in Second Grade, her teacher, Ms. McKinney, wrote "W's many absences have injured with her learning . . .her absences continue to interfere with her progress; she has made progress, she wants to learn." (Ex. A, p. 329). Her teacher in Georgia noted frequent absences and frequent head lice. (Ex. A, p. 740). In February 1996, while still in Second grade, a Georgia school psychologist noted that W's family drawing suggested family turmoil. W had confided that she is often afraid of her stepfather who abuses her mother. (Ex. A, p 743) While in Lumpkin County School District, Georgia, W was certified with Emotional Behavioral Disorder (EBD). The EBD eligibility report noted W lived with her mother, and step-father; she indicated her step-father was abusive to her mother; she had difficulty coping with severe stressors in the home, and she did not cry or seem sad in class. (Ex. A, p. 723-724).

In Third Grade, W was placed at several different schools. During the first grading period of the 1996-1997 school year W was present 24 days and absent 21. At the time of her withdrawal on November 19, 1996, she was present 24 days and absent 3. (Ex. A, pp. 115, 322) The Juvenile Court of Dawson County, Georgia, ordered W removed from her mother's custody on February 14, 1997. (Ex. A., pp. 112-13) On February 18, 1997, W's guardian/foster parent, Jerry Ayers, enrolled W at Long Branch Elementary School. (Ex A, p. 119) While in foster care, W was present 62 days and absent only 6 days. (Ex. A. p. 322). On May 22, 1997, W was placed in the custody of her grandparents, James and Bobby Davis. (Ex. A, pp 108-09)

In Fourth Grade, W. returned to Knox County Schools. Upon W.'s enrollment in Karns Intermediate School on August 14, 1997, based upon the information received from her mother, an IEP Team placed her in 12 hours of Resource for Reading, Spelling and Math. (Ex. A, p. 654). Upon receipt of the records from Georgia, another IEP team meeting was held. As a result, W was moved to the CDC classroom for special attention to her learning disabilities. (Ex A, p. 646)

Principal Fran Thompforde in Knox County Schools remembered W as a kid who liked to run errands for the teacher. She also recalled W still had a lot of problems dealing with head lice. (T., p. 646) Mrs. Thompforde described W as talkative and pleasant while her hair was picked for nits. (T., p 647)

The student had a good relationship with the office staff at Karns Intermediate School. The Principal never noticed any problems separating from mother or having any problems going home from school because of sickness. (T. p. 648) The student absences while in the Fourth Grade were: 5 absences in each of the first and second grading period and 4 absences in the third grading period (T., p. 649; Ex. A, p 314) The absences increased in the second semester of Fourth Grade, when W returned to mother's custody at the very end of the fourth grading period, w was absent 9 days in the fourth grading period, 7 days in the fifth grading period and 10 days in the sixth grading period. (T., p. 650, Ex. A., p 314)

Mrs. Thompforde, who was a special education teacher before becoming a Principal, had no recollection of W's mother asking for help. She was never told of any particular problem for W coming to school. Mrs. Thommpforde noticed no anxiety when dealing with W and did not find any indication that W was emotionally disturbed. (T., pp. 651-52) In addition to Special Education through her IEP, the school social worker, school nurse and the Principal provided services to W. (T., pp. 659-60)

In Fifth grade, W absences continued at a new school, Pond Gap Elementary School. Staff became concerned about the number of absences and requested services from the Social Services Department. Letters regarding attendance were sent from the social worker to W's parent. (Ex A, pp 30, 310-311) W's Fifth Grade regular education teacher, Mrs. Lewis, noted, "W does not come to class. When she does, she does not work as she passes notes inviting girls to her home for sleepovers, or she is absent due to severe lice in her head." (Ex. A., p. 306). Meanwhile, W. was receiving 15 hours in the CDC classroom with Ms. Swanson.

An IEP Team meeting was held September 28, 1998 to discuss the three-year reevaluation and absences. As the IEP noted, by September 28, 1998, W had been absent 12 days and present 17. She was out for one day, September 18, 1998 for the death of her great grandmother. She was sent home twice with lice nits. The first time she was out, she returned the next day; the second time she was out 6 days due to the nits. She was sent home on September 14, 1998 and returned September 23 with a doctor's note saying she was seen in the emergency room on September 21, and could return to school, with no P.E. until September 28, 1998. Mother stated she took W to the emergency room for a sprained ankle. She was out September 2nd and 3rd with a stomach virus, and there was a handwritten note received from the parent. The IEP team, including W's mother, considered the excuses she provided and the information provided at the meeting and determined that W's attendance was not a manifestation of her disability. (Ex. A, p. 636).

On October 23, 1998, while still in Fifth Grade, a contract with the student and parent was signed regarding attendance issues; proof of absences was supposed to be provided, and the parties agreed to regular attendance. (Ex A., p. 305) "Notice of 10 or more Unexcused Absences" was sent to the parent and this notice informed the parent of the Knox County Juvenile Court Order requiring the reporting of unexcused absences. (Ex. A, p. 304)

On January 20, 1999, W and her mother met with the school social worker and the Supervisor of social workers for Knox County Schools at Juvenile Court regarding W's absences. The parent indicated that W had been out sick with some viruses, and that she was not aware of the 30 absences. (Ex. A, p 299) Meanwhile, the school social worker, Cynthia Whitcock, and the school nurse, Mary Luhuary, continued to provide information to the parent and offer meetings and assistance (Ex. A, pp. 296-97). W was absent 53 days that year. (T, p. 456)

In Sixth Grade, W. was absent 115 days (Ex. A, p.266) Various excuses were presented to cover the absences. See Exhibit A, pages 272-280.

In August of 1999, the school psychologist and the clinical psychologist completed the re-evaluation begun in Fifth Grade. After many attempts to hold an IEP Team meeting, an IEP team finally was met with the mother on December 13, 1999, and W was decertified for Special Education services. (Ex. A, pp. 159 a-c, 610) The IEP Team of December 13, 1999 considered the effects of insufficient teaching on educational performance and could not rule out chronic excessive absenteeism as a cause of the low achievement. (Ex. A, p 610)

The clinical evaluation did not show major discrepancies or difficulties, and no emotional disturbance and the language evaluation should no issues. The Team did not certify W. Modifications in the Regular Education program were made for W and included: oral testing and oral directions, written assignments, and additional time for assignment completion, study guides with notes, preferential seating and peer tutoring. (Ex. A. p. 610) Parent signed in agreement on September 13, 1999.

At the August 22, 2000 meeting, a support team meeting was held and offered to evaluate W in the regular education classroom or in the diagnostic program at KAAP (T., p. 1064, Ex. A, pp 603-06) The student was to begin school at KAAP on August 28, 2000; instead the student did not enter until September 7, 2000. (T. p. 944; Ex. A, p, 185, 196, 234-35 and 1337) When W arrived at school on September 7, 2000; the Mother explained that the child had been out of town for a couple of days. (Ex. A, p. 185) W. arrived at school around 8:30 a.m. on September 7, 2000. The classroom teacher, Ms. Goldman, testified that W left her mother and entered the classroom with no apparent anxiety and began working on assignments. The parent phoned two times to check on W and each time school staff went to the classroom to determine how she was doing. On September 8, 2000 the student left early due to an accident involving a family member and did not return to school till two weeks later. (T., p. 946)

At a meeting on November 17, 2000, the school system received a copy of the Juvenile Court ordered evaluation of W and her mother, W was placed on homebound instruction, and the diagnostic clinicians and homebound teacher determined when W's homebound instruction would be provided as homebound at the school. (Ex. A, p. 597) Homebound instruction began in the home for a period of time with limited success. In January 2001, homebound sessions began in the KAAP classroom after students had left for the day. Ms. Goldman, the classroom teacher testified that W's mood was fine in the classroom, and she seemed to enjoy the classroom experience. (T., p. 953) During the homebound sessions at the school, W was absent about 50 percent of the time. Absences were for several reasons, which included mother's employment, illness of her mother, the mother's dental work, car problems and W's physical illnesses and out of town with relatives. (T. p. 956) The purpose of the homebound services at school was to provide a time to complete evaluations. On August 30, 2001, an IEP Team meeting was scheduled to go over evaluation results based on W's time in the diagnostic program. The IEP Team of August 30, 2001 found W not to be eligible for Special Education services. (Ex. A, p. 589). The IEP team provided a transitional program for W to stay at KAAP for several weeks to adjust prior to returning to the middle school program and compensatory homebound hours were given. (Ex. A, p. 592). During the transition period, the parent's advocate asked for an Independent Educational Evaluation.

While arranging for an IEE, the parent asked for a Due Process Hearing. The student remained at KAAP with the homebound arrangement during the pendency of the IEE. The student only attended about one half of the time during this period of time. (T. p. 977)

For the present school year, the student is in a class consisting of all girls in the 6th through the 8th grades. One of her teachers said she fitted in quiet well and has several friends. (T., p. 1046-47; Ex. A p. 815a) The student was to report to school at 10:30 a.m. and yet very seldom got to school at that time. (T. p. 458) The District had plans of extending the student's hours as the year progressed but instead the student simply failed to come to school at all. (T. p. 459)

Dr. Greer found it important that W had a chronic struggle in school for a variety of reasons. Her limited, low average to borderline I.Q. would make school difficult for her, as would be the real deficit at this time of academic skills. He believed that W had conditions early in her life that caused her to be rather anxious about school. She had been teased by peers. She was overweight for much of her life. She also had some hygiene problems in the past, including multiple absences for head lice, and at time-evaluators had noted body odor. These may have attributed to negative social experiences at school. (T., p. 867-68.) Another factor of importance Dr. Greer noted was while in Georgia, W. had confided in school personnel she was worried because the man living in the house with W. and her mother had at times been physically assaulting W.'s mother. Understandably, any child would be anxious with that kind situation, Dr. Greer noted. Dr. Greer believes that over the years the anxiety has diminished with regard to fears for her mother. Her aptitude and academic skills can make school a very unpleasant place and contributed to reluctance on her part to attend school. (T., p 868-69)

Dr. Greer stated "In spite of anxiety throughout her school career that she has had, understandably, because of these conditions, I do not believe and do not believe now that the degree of anxiety gave her condition under which she would be eligible to receive special education services as emotional disturbance." (T.,p 869) Beginning in her educational career, there has never been a very consistent overwhelming pattern of anxiety in the school environment. She is noted to be a polite person, quiet or shy, but she was never overtly distressed; she was not vomiting or having somatic physical complaints that caused her to go home according the school staff. She has been uncomfortable and her mother knew of that outwardly, but she did not demonstrate that at school. There was no indication from current teachers that she was experiencing significant anxiety at school. (T., p. 869-70)

Dr. Greer's conclusion was "While school has been an unpleasant experience for her most of her life, which has really contributed greatly to her refusing to attend, it was not anxiety that precluded her from going or is precluding her from participating in her education (T., p. 870)

Dr. Greer evaluated W. to see if she met the eligibility criteria for a child with emotional disturbance. (T., p. 870) He considered each factor to see if she exhibited it to a marked degree. When asked if the child exhibited to a marked degree on of the following:

- I. inability to learn which cannot be explained primarily by intellectual, sensory, health or specific learning disability factors;

Dr. Greer said:

She does not...I believe that her major problem with her inability to learn has been limited school experience. That has been huge factor that I believe you cannot rule out. I also believe cultural differences have contributed to this as well...She did not meet the characteristics because there has been no documentation of an inability to learn. She does learn painfully slowly. That has been difficult, but there is evidence that she can learn, and clearly I believe she could learn were she attending school everyday; it's very difficult to learn if you're not in school
(T., p. 871)

- II. inability to build or maintain satisfactory interpersonal relationships with peers and teachers, and other significant persons;

Dr. Greer states:

She did not meet that criteria...She was able to maintain a good relationship with Ms. Goldman, I believe she was also able to establish relationships with other personnel at the school,...Ms. Wynn, the receptionist, and Dr. Loy, the Principal; when she took a tour at Karns Middle School she apparently recognized and knew several students that she had known from the Intermediate School...with Ms. Russell, has been her most recent teacher,...but also she has established some friendships with the other girls in the classroom and she has interacted with them in the classroom but also had some interaction or contact with them outside of the classroom...The day of the evaluation in '99, she was dressed to go to a school dance that night; it has never been evidenced that she was unable to build and maintain these relationships with peers or school personnel.(T., p. 877)

III. inappropriate types of behavior or feelings under normal circumstances;

Dr. Greer stated:

She does not. From conversations with teachers, Ms. Goldman and Ms.

Russell, did not in any way report any inappropriate behavior or feelings

or reactions...If you look at the evaluations...In Georgia...there was no evidence at all of any inappropriate behaviors or feelings or reactions in

the absence of any stressors...In Georgia, they did notice some degree of

anxiety when she was witnessing this man reportedly physically mistreating her mother and you would expect any child to be anxious about that. What's important...is that anxiety in no way interfered with

her to go to school or interfered with her ability to participate in her academic curriculum. That is not an inability to go to school because of

anxiety it was a refusal to go to school. It was refusing to face an unpleasant situation.(T., p. 879-80)

IV. general pervasive mood of unhappiness or depression;

Dr. Greer stated:

I do not believe she meets that criteria either, because Ms. Russell and Ms. Goldman will tell you that her mood typically was good, friendly mood, and comfortable mood in the classroom setting;...In general, personnel did not describe her as depressed; the teacher rating

scales were never elevated for depression, and teachers have never reported any consistent significant depression that would expect with someone who was emotionally disturbed.

When Dr. Greer interviewed her, he did not find any sign of depression, and did not endorse depression. (T., p. 881) Dr. Gordon Greeson, W.'s former treating psychiatrist, did not find any depression. (T. p 882)

V. tendency to develop physical symptoms or fears associated with personal or school problems.

Dr. Greer stated:

I don't believe she meets criteria either. I think she has had some anxiety but it has not been to the degree that it was disabling and that it impacted her ability to go to school. Her ability to go to school has always been there although she's been discouraged and has refused. (T., p. 880)

Dr. Greer testified that you must look beyond education disability to the cultural part of W. and her family. As her role models, W.'s family did not hold jobs that required a high school diploma. They did not have a commitment to regular employment. They have had many jobs throughout the years. The family was good-hearted to baby-sit for a child, but that was more a priority than insuring that W. was well-rested and in a position to go to school. Further, the family has not demonstrated commitment to regularly seek and continue psychiatric treatment. "And so the family has demonstrated to her a large lack of commitment to what are probably very important factors in her life..." (T., p. 872-74)

Dr. Greer said the central issue right now is motivation. She does not want to go, and she is refusing because it is unpleasant and has no meaning in her life. "She's got to have a change in her attitude or outlook to do that...[A]s she's living at home with her family, she will not be able to turn the corner and go to school." (T., p. 892) However, Dr. Greer stated that when she was placed in foster care in Georgia, absenteeism dropped and this environment was able to influence her to go to school. (T., p. 893)

Dr. Phillip Kronk is a clinical psychologist licensed in the state of Tennessee. (T., p. 669; Ex. D) He is currently working on his post-doctoral masters degree in clinical psychopharmacology. Since the beginning of his practice in the late '70's, he has done clinical work and worked with children. His publications include a handbook for school systems and parents about understanding the type of family that you have and how it affects your child's problems. (T., p. 673)

Dr. Kronk began the evaluation of W. without being provided any information from Knox County specifically related to the background of this matter. (T., p. 676) He did the evaluation at the home of W. and met W., her mother, her grandmother and other members of the family. (T., p. 677) When Dr. Kronk interviewed W.'s mother, he was told that W. was improving, she was not fighting with her brother, mother, or grandmother. She was getting out more with her niece, and W. had a new boyfriend that she was with once or twice a week. Also that W. had two female cousins that she saw once or twice a week; W. was also babysitting for a two-year old at the time. (T., p. 670)

When Dr. Kronk was able to interview W. in her home, W. told him that she played pool with her cousin, went to the movies with her, was eating and sleeping better and was not anxious—in her words “just a little” when she was around other people. W. indicated she was in a good mood; and the new medicine was really helping her. W. denied being nervous and jumpy except when around other people she didn’t know, and she indicated to Dr. Kronk she just wished she was skinny and pretty and maybe that would make it easier to be around other people. (T., p. 680) Dr. Kronk and W. talked about what made her angry and she said, “When I can’t get my own way. I admit I’m spoiled. I’m the youngest.” (T., p. 680)

On the second visit to the home, Dr. Kronk described her as animated. She told Dr. Kronk she was ready to go back to KAAP for homebound though a little scared. (T., p. 681; Ex.A, p. 460)

When Dr. Kronk saw her again some five months later, W.’s mother told him that W. was seeing a psychiatrist and a counselor at Peninsula Lighthouse and W was going for homebound on Tuesday and Thursday. W was going out with her cousin a couple of days a week and she talked with her friends on the phone every other day. W stated she was only lonely a little bit of the time. When Dr. Kronk went to interview W alone, W.’s mother said she did not want to be interviewed with him alone, but Dr. Kronk insisted that the parent leave. Then, W. spoke with him without protest or any sign of anxiety. W. said she was not anxious during the interview. W. stated to Dr. Kronk she only gets anxious and worried about every three or four days and she wasn’t depressed hardly at all. (T., p. 684; Ex. A, p. 460)

Based upon the psychology testing done by Dr. Kronk, it helped him understand that there wasn’t a great deal of anxiety or depression in the child at the time. [T., p. 687.] The Achenbach Youth Self-report was given to W. It measures for depression or anxiety and whether a person is disruptive or delinquent or if a person is isolating or have a lot of somatic complaints. W. did not rate herself as being in the significant range or even at a risk for anxiety, but she had many complaints about her body such as headaches and not feeling well. (T., p. 688; Ex. A, p. 461)

Dr. Kronk spent a great deal of time reviewing the educational records in this matter. (T., p. 689) Based upon his findings and ideas, it struck as very important that truancy had always been an important factor in W.’s life ever since the first year of school. (T., p. 691) There were an enormous amount of absences. (T., p. 693; Ex. A, p. 28, 461)

"Therefore, if you come into a school setting with a very, very low I.Q. and unless you come everyday and unless you are motivated and unless you are involved and engaged and unless your family really encourages you do that, then school is going to be very difficult and it's going to have a cumulative type difficulty." (T., p. 693-95) "So all through her life, from the very beginning, this young lady has been absent from school for large periods of her life and that does not give her an opportunity...to have a relationship with a teacher that is on-going so that there's somebody nurturing and encouraging who will make you want to learn." (T., p. 695)

Dr. Kronk felt that there was a logical explanation for a certain amount of discomfort in this child's life: obesity, head lice, appearance, a limited I.Q., and a lazy eye. (T., p. 701-02, Ex. A, p. 464) Dr. Kronk felt that it was important to look at the family structure and not just the child itself, and that the behavior differing from the norm on going to school was a deviant type of behavior. Obviously, it's the value that is set by the family that says it's good to go to school and to attend school everyday, that's a value. But also we have here that it may be better to be with the family, better to be with us instead of going out into the world that is dangerous or it's really good to be home. (T., p. 705-06) Therefore, there becomes a career or a step-by-step process where the child doesn't go to school and the child is encouraged and not reinforced to go to school. People who have school refusal have made a career of not going to school. (T., p. 706) "This young lady...has become...very, very dominant in terms of her controlling behavior, and the mother has been inadequate to the task. Not that she's been a bad mother, but she's inadequate to the task...of getting this child to school, for whatever reasons, the family needs this child and has needed this child to be at home for a long time." (T., p. 706-707) The school refusal is a pattern of relating among the members of the family, it's encouraged subtly, sometimes directly, but it's a value that the family holds. (T., p. 707)

When Dr. Kronk had further opportunity to observe W. in December 2002. She was not anxious or depressed, and she did fine. She talked to other girls, established friendships, and asked the teacher for help. (T., p. 726) Looking at this child away from the home situation, she's not anxious; she's not depressed; she functions fairly well considering someone who has been away from school for many periods of time. She obviously seems to enjoy the relationship with these other young ladies at school. (T., p. 727)

After Dr. Kronk's extensive evaluation of W. in her home, in the school setting, and observing her in the regular school classroom taught by Ms. Russell, he concluded that she is not emotionally distressed. (T., p. 731)

Dr. Kronk testified the State Manual regarding emotionally disturbed students requires that an examiner must make efforts to deal with the student's problems and must also look at "the family dynamics that may be contributing to the maintenance or solution of the student's problem" and "any social or cultural factors responsible, in part or in whole for the student's problem." (T., p. 729; Ex. A, p.457) Dr. Kronk specifically reviewed the "E.D." criteria:

- I. inability to learn which cannot be explained primarily by intellectual sensory, health or specific learning disability factors;

Dr. Kronk stated that he believed she had trouble at school for two reasons given her borderline I.Q. and no regular attendance pattern. However, he did not believe that she had an inability to learn as required in this criteria. (T., p. 731-32)

- II. inability to build or maintain satisfactory interpersonal relationships with peers and teachers, and other significant persons;

Dr. Kronk did not feel that W. had this inability. There is a difference between the inability and shyness. She may have been withdrawn at times, but she related to her family, to her relatives, to a past boyfriend, the child she was baby-sitting with, the young ladies at KAAP classroom setting, and she spoke with people on the phone. She had a strong ability to relate to her mother and to her brother. There was no inability to relate to others. (T., p. 733-34)

- III. inappropriate types of behavior or feelings under normal circumstances;

Dr. Kronk correctly uses the State Manual on inappropriate types of behavior. These behaviors include flat affect, bizarre verbalization, self-mutilation, manic reactions, delusions, hallucinations, obsessions, unexplained rage or violent temper tantrums, fantasy of life that seems out of touch with reality, masturbation, sexual verbalization that's unprovoked is talking about something severe. "She did not have that kind of behavior. She did not show inappropriate types of behavior in class. She did not meet the criteria." (T., p. 736)

IV. general pervasive mood of unhappiness or depression;

Dr. Kronk stated she denied depression. She said the medication was working. When she was given the self-report on the Achenbach, she did not rate herself as depressed or anxious. She was not depressed when she related well to the students in her classroom and there was never any pervasiveness of depression. (T., p. 736-37)

V. tendency to develop physical symptoms or fears associated with personal Or school problems

Dr. Kronk states"

As I say in my report,...this young lady has been diagnosed and medicated for anxiety...and as my report showed, that there was a strong family and motivational component to her behavior and that had become entrenched and enforced by her lack of school attendance and that the family had basically given her a career as somebody who gets all their needs met at school, and for that reason I did not see it as emanating or starting from an internal emotional problem that was causing her not to go to school. (T., p. 737-38)

Aside from all the opportunities within Knox County Schools, W had also numerous counseling opportunities with private providers—Nancy Brown, Peninsula Lighthouse (Dr. Geerson), and Family Psychiatric (Amber Nussbaum and Dr. Houser). However, W and her parent have failed to keep numerous appointments with these agencies. Furthermore, other resources were available in the community to assist W and her family. Pamela Swafford, Team Coordinator with the Knox County Community Services Agency (KCCSA) explained the resources available. Prior to the hearing, Mrs. Swafford discussed services KCCSA has available with the parties' attorneys. (T. p. 1037) KCCSA provides families with resources of counseling, housing, education, budgeting, general assistance and advocating for their needs. (T. p. 1038) This Community Service Agency takes referrals simply where a parent requests assistance with their child from the Juvenile Court – without any petition or charge. (T. p. 1041)

III. Issues

1. Has Knox County Schools improperly failed to certify W as a student eligible for Special Education Services under the disability certification of seriously emotionally disturbed or learning disabled?
2. Has Knox County Schools failed to pay Dr. Connie Bell in accordance with the contract between Bell and the school district for providing W. with an Independent Educational Evaluation?

IV. Conclusions of Law

The School District has the burden of ensuring that all students with disabilities are offered a free appropriate public education (FAPE) "sufficient to confer some educational benefit upon the handicapped child." *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 200 (1982).

The District has extensively evaluated and carefully placed W (from 1995 through 1993) in an array of programs and services that offered educational benefit; but when a school system offers appropriate access to a child and is frustrated in its efforts by excessive absences, it should not be concluded that the program offered was inappropriate only that the program was never given the chance to succeed. *Doe v. Defendant I*, 898 F.2d 1186 (6th Cir. 1990)

Eligibility Under IDEA

Petitioner, W., is not eligible as a learning disabled student under IDEA, Tennessee law or implementing regulations. IDEA guarantees a "free appropriate education (FAPE) to children with disabilities." 20 USC 1415(a)(1) and 1413(a). Under IDEA, a student becomes eligible for special education services if he/she has a qualifying disability, including emotional disturbances ("ED") or a specific learning disability ("LD")

1. Eligibility of Emotional Disturbance

A student becomes eligible for special education services if he/she is evaluated and as having a serious emotional disturbance (hereafter referred to as emotional disturbance.) Emotional disturbance is defined as follows:

- (i) The term means a condition exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's education performance:
 - (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors
 - (B) An inability to build or maintain satisfactory interpersonal relationship with peers and teachers
 - (C) Inappropriate types of behavior or feelings under normal circumstances
 - (D) A general pervasive mood of unhappiness or depression
 - (E) A tendency to develop physical symptoms or fear associated with a person or school problem.
- (ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

34 CFR 300.7(4)

2. Eligibility for Specific Learning Disability

While the State of Tennessee has changed the discrepancy formulas for specific learning disabilities during the time of evaluation and due process hearing, there are always rule outs for the determination of learning disabilities. School systems must rule out whether lack of instruction in reading, math or limited English proficiency are a determinative factor in eligibility.

Upon making the determination of eligibility of a child for IDEA, a child may not be determined eligible if the "determinant factor for that eligibility determination is lack of instruction in reading or math." 20 USC 1414(a)(5) and Tenn. Regs. Rule 0520-1-9-.06(2). W.'s lack of attendance has to be the rule out in this criteria.

3. Truancy

Under Tennessee law, the school system also has the requirement for compulsory education and the reporting of truancy. TCA 49-6-3001 et. seq. The District has offered the parent meetings and training opportunities with a licensed clinical social worker, social workers, nurses, guidance counselors, and group meetings with trained staff, but these opportunities have been declined, missed or not remembered.

4. Independent Educational Evaluations

A parent has a right to an independent educational evaluation at public expense. (34 CFR 300.502) Public expense means that the public agency either pays for the cost of the evaluation or ensures that the evaluation is otherwise provided *at no cost* to the parent. Knox County Schools has ensured that the IEE has been at no cost to the parent.

V. Discussion

Ms. Donna Smith, an attorney, was appointed by the Knox County Juvenile Court in August 2002, as Guardian Ad Litem for W, in order to investigate the circumstances related to the charges brought against the parent for allegedly refusing or failing to send her child to school. (T., p. 183) Ms. Smith's understanding of the position of the school system was that W's absences from school did not involve anything other than her mother's failure to perform her duty as a parent.

The impression Ms. Smith got from talking with school officials was that the school placed blame with the parent for W's failure to go to school and was the factor they were looking at. (T. pp. 186-187) While not a trained psychologist or social worker, Attorney Smith has found the crux of the matter. The school district has done everything within their power to attempt to get appropriate services for this student since the first time the student stepped in the first school building. The District has been totally hindered by the lack of support from the home in getting the student to school. When the student did attend school, services were provided abundantly and the student did receive FAPE while she was eligible under IDEA. However, it is the severe absenteeism of this student that is the root of her problem. The only time in the record ha the student has attended school on a regular basis was when he student was in foster care enrolled at Long Branch Elementary School in Georgia. During the foster parent care, the student's absenteeism was drastically reduced.

The Court finds the testimony of both Dr. Greer and Dr. Kronk to be highly credible and finds that the issues at home to have caused the student to fail to attend school. Further, according to Dr. Lukosius' report, W may utilize somatic defenses to avoid situations that she dislikes or finds uncomfortable and that these somatic defenses had been effective over the years in soliciting care giving behaviors from her family members and that W would benefit from learning more adaptive coping strategies to deal with the stress she will experience as she faces adolescence. (T. pp. 46-47, 168-169 R. p. 501)

The evidence presented in this case shows that W has exhibited a long standing and pervasive problem with attending school. The excessive absenteeism has been a factor in this student's life since Kindergarten. Further the evaluators for Knox County's KAAP program for the years 2002-2003 and the IEP Team for January 24, 2003 did not find W was emotionally disturbed or learning disabled. The student has been placed in an appropriate educational setting in a small regular educational program that provides instruction based upon the individual needs of each student. However, as Dr. Kronk and Dr. Greer both stated, a child with a low I.Q. and very little motivation to come to school will develop negative feelings toward school. These feelings have developed in a career for W. The parent has unknowingly, for the most part, bought into W.'s various complaints and has allowed W to miss excessive amount of time from school throughout W's educational experience. W. has become very dominant in terms of controlling behaviors that have led to her multitude absences.

The Court finds that the issue regarding payment of services for the IEE performed by Dr. Bell is not an appropriate issue before this forum. There has been no evidence that the parent was charged for this evaluation.

The IDEA provides for a Free Appropriate Public Education to be provided to the student and her family. The School District has done this while the student was eligible for Special Education. A dispute regarding payment is between the evaluator and Knox County Schools and is a contractual dispute. This tribunal does not have jurisdiction over the subject matter.

VI. Conclusion

W is a student who needs intensive help by the parent to ensure the student attends school. If the student attends school on a regular basis she will succeed, albeit, at a slower rate than the average student but would still succeed. However, based on the various expert witnesses, the student is neither educationally disturbed and it is unfounded that she presently has a learning disability. What is for sure is that the student has found excellent methods of staying out of school. Over a period of many years, W has perfected methods to convince her mother and others, that she cannot attend school. Knox County Schools has gone beyond the legal requirement of IDEA to provide an appropriate education for the student while she qualified for Special Education. Now, that she no longer qualifies, the District still extends the student all forms of assistance for her to be successful. However, the District is stymied due to the lack of attendance of the student and her family to access the abundant services of the school district and other social agencies of Knox County. Further, the parent and family have failed to attend appointments, to return phone calls and declined assistance at their home.

The School District has proven that the District has spent considerable time, money, and energy in finding ways to serve W but the parent and the child have refused to cooperate to get the child to the services. The School District has been falsely accused of refusing to certify W as a child with a disability. Actually, for good reason, Knox County Schools have followed the IDEA. The District is forbidden by federal law from providing Special Education services until the child is found eligible. This Court fails to find the student eligible under both IDEA and Tennessee Special Education statutes.

VII. ORDER

IT IS HEREBY ORDERED that W is not a "child with a disability" as defined by state and federal law and is not eligible for special education and related services.

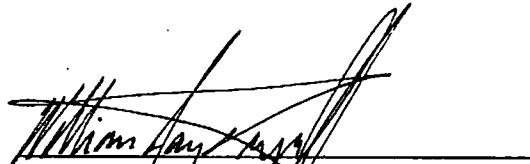
IT IS FURTHER ORDERED that W has not been denied a free appropriate public education, including special education and related services as defined by state and federal law.

IT IS FURHTER ORDERED that the Knox County School System approved Dr. Corrine Bell to conduct an independent educational evaluation. The dispute regarding payment is beyond the jurisdiction of this tribunal and Dr. Bell must seek relief in another forum.

IT IS FURHTER ORDERED Knox County School System is the prevailing party on all issues in this Due Process Hearing.

THIS DECISION IS BINDING UPON ALL PARTIES UNLESS APPEALED. Any party aggrieved by the findings and decision may appeal and by filing a petition in the Davidson County Chancery Court of the State of Tennessee, unless another court is specified by statute; or may seek review in the United States District Court for Tennessee. Such an appeal must be taken within sixty (60) days of the entry of final order in non-reimbursement cases and with three (3) years in cases involving reimbursement of educational costs and expenses. In appropriate cases, the reviewing Court may direct that this Final Order be stayed.

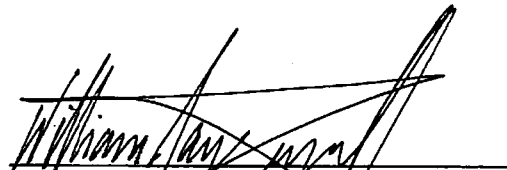
ENTER this the 30th day of July 2003.



William Jay Reynolds (013932)
Administrative Law Judge
55 Court Street, Suite A
Savannah, TN 38372
(731) 925-7000

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Final Order was mailed on the 30th day of July 2003, to: counsel for the school system; and counsel for the parents; and the Tennessee State Department of Education, Nashville, Tennessee 37243-0375.



William Jay Reynolds